JAN 13 2017

The Honorable Debbie Stabenow
U.S. Senate
Washington, D.C. 20510

Dear Senator Stabenow:

Thank you for your January 11, 2017, letter regarding the status of the U.S. Department of the Army (Army) and U.S. Environmental Protection Agency (EPA) Clean Water Rule. We share your concerns about misinformation being reported about the rule and appreciate the opportunity to respond.

The Clean Water Rule was promulgated in response to requests the agencies received from thousands of stakeholders who asked us to replace existing confusion, delay, and inconsistency with improved regulations defining the scope of the Clean Water Act (CWA) consistent with the law and the best available science. Our goals were to make the process of identifying waters covered, and not covered, by the statute more understandable, transparent, and effective and to accomplish this without changing any of our longstanding exemptions for farmers, ranchers, and foresters. After years of work involving an unprecedented level of public outreach and benefitting from the latest peer reviewed science, the final Clean Water Rule was published in the ***Federal Register*** in June 2015. The rule was subsequently challenged in federal court and its implementation temporarily stayed by the 6th Circuit Court of Appeals in October 2015.

Your letter raises important questions regarding the status of the rule and how the agencies are currently implementing the CWA. We hope you and your constituents find our answers responsive and helpful.

Question 1: Are the EPA and the Corps currently implementing the new Clean Water Rule?

Answer: No, the agencies are not now implementing the new Clean Water Rule. Implementation of the new rule was temporarily stayed by the 6th Circuit Court of Appeals in September 2015. The agencies immediately directed their field offices to stop using the new rule and instead, resume implementing regulations and interpretive guidance in place prior to the new rule.

Question 2: Are the EPA and the Corps currently pursuing enforcement actions pursuant to the new Clean Water Rule?

Answer: No, the agencies are not pursuing any enforcement actions pursuant to the new Clean Water Rule and will not enforce this rule unless and until the 6th Circuit Court of Appeals stay is lifted.

Question 3: Does anything in the Clean Water Rule revoke or otherwise modify the CWA's statutory and regulatory exemptions for farming and ranching?

Answer: No, the Clean Water Rule makes absolutely no changes to normal farming, ranching, and forestry exemptions established under the CWA and implementing regulations.

Question 4: Some have claimed that landowners will no longer be able to rely on the CWA's statutory and regulatory exemptions for farming and ranching should the Clean Water Rule go into effect because, while the statute and regulations remain unchanged, the agency has narrowed those exemptions "in practice" through their actions in the field. Is that true?

Answer: The assertion that the agencies have narrowed application of the statutory and regulatory exemptions for farming, ranching and forestry is untrue. The agencies have taken no steps intended to reduce the scope of the exemptions and we have not observed changes by field offices in the way they interpret or implement these exemptions. In fact, EPA and the Corps have reemphasized publicly that these exemptions are self-implementing. Farmers, ranchers, and foresters are not required to get approval from the agencies prior to using the exemptions.

Question 5: Several case studies related to farming practices – including examples related to plowing, discing, construction of stock ponds, and new uses of cropland – have been presented to members of Congress to suggest that the Clean Water Rule is expanding the agencies' jurisdiction under the CWA. If you are familiar with the aforementioned case studies, are any of them examples of new enforcement actions under the Clean Water Rule?

Answer: The agencies are aware of case studies being presented in support of assertions that the Corps and EPA are already using the Clean Water Rule and its principles to expand jurisdiction under the Act and to narrow the scope of farming, ranching, and forestry exemptions under CWA section 404(f). The fact is that ALL of the case studies that we have seen were initiated prior to the Clean Water Rule, and many represent decisions made in the previous administration. This means the agencies' actions were taken under the regulations and guidance (e.g., the Corps 1986 Regulatory Program regulations, and the 2008 Joint Guidance) in place prior to the Clean Water Rule. In addition, implementation of the Clean Water Rule has been temporarily stayed by the 6th Circuit Court of Appeals. The agencies have not, and will not, enforce or implement the Clean Water Rule during the stay.

Question 6: Are some or all of the cases highlighted actually federal enforcement cases conducted in accordance with agency regulations promulgated prior to the Clean Water Rule?

Answer: Yes, all the cases presented (including enforcement actions, jurisdictional determinations, and Section 404(f) exemptions) represent actions and decisions which were made using the regulations and guidance in place prior to promulgation of the Clean Water Rule. These cases reflect actions taken under agency regulations in place for as long as 30 years (e.g., Corps 1986 Regulatory Program regulations).

Question 7: Considering all of the agencies' jurisdictional determinations since the *SWANCC* (2001) and *Rapanos* (2006) cases, is it fair to characterize the Clean Water Act's current geographic scope as narrower than it was prior to those decisions?

Answer: Yes. The Supreme Court decision in SWANCC reduced the geographic scope of jurisdiction under the Clean Water Act. After SWANCC and Rapanos, consistent with guidance and Corps and EPA regulations, the agencies have asserted jurisdiction under the CWA more narrowly than was the case prior to those decisions.

Question 8: Are Prior Converted Croplands still excluded from Clean Water Act jurisdiction?

Answer: Yes. Prior Converted Croplands (PCC) remain non-jurisdictional under EPA and Corps Clean Water Act regulations. EPA and the Corps promulgated final regulations in 1993 (58 Federal Register 45008) excluding PCC from CWA jurisdiction and these rules remain in effect without change.

Question 9: Are permafrost soils considered waters under the Clean Water Act?

Answer: No. The presence of permafrost is itself NOT determinative of the existence of wetlands or waters of the United States. Permafrost is a permanently frozen layer of soil, sediment, or rock at varying depths below the surface and found in polar regions.

Thank you again for your letter. Please call us if you have any questions or your staff may contact Denis Borum in the EPA's Office of Congressional and Intergovernmental Relations at borum.denis@epa.gov or 202-564-4836; or Gib Owen in the Office of the Assistant Secretary of the Army (Civil Works) at gib.a.owen.civ@mail.mil or (703) 695-4641.

Sincerely,

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